

IN THE SUPREME COURT OF FLORIDA

LEO EDWARD PERRY, JR.,

Appellant/Cross-Appellee,

vs.

CASE NO. SC96499

STATE OF FLORIDA,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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vs.

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STATE OF FLORIDA,

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

References to the clerk's record will be designated with the prefix "R" followed by the volume and page number. The transcript will be similarly designated with the prefix "T." An appendix is attached to this brief containing the trial court's sentencing order and will be designated with the prefix "App."

STATEMENT OF FONT SIZE

This brief has been prepared using Courier New, 12 point, a font which is not proportionally spaced.

STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On November 24, 1997, an Escambia County grand jury returned an indictment charging Leo Edward Perry, Jr., with the first degree murder of John W. Johnston. (R1:1-2) The indictment alleged both premeditated murder and felony murder with robbery as the underlying felony. (R1:1-2) The date of the offense was alleged as February 21, 1997. (R1:1-2) Perry proceeded to a jury trial which commenced on July 19, 1999. (T1:9) At the conclusion of the guilt phase of the trial, the jury returned a specific verdict finding Perry guilty of first degree murder under both premeditated and felony murder theories. (R2:288-289; T7:1227-1229) The penalty phase of the trial was held on July 23, 1999. (T7:1235) The jury recommended a death sentence by a vote of 10 to 2. (R2:305; T8:1528)

A sentencing hearing before the judge only was held on August 5, 1999. (R2:349) The court received sentencing memorandums from the State and the defense and also heard the testimony of one of Perry's former employers. (R2:312, 332, 349-363) On August 26, 1999, Circuit Judge Joseph Q. Tarbuck announced the imposition of a death sentence. (R3:383) The court filed a written sentencing order finding three aggravating circumstances: (1) murder committed during commission of a

robbery; (2) murder was especially heinous, atrocious and cruel; (3) murder was committed in a cold, calculated and premeditated manner. (R3: 398-401)(App. A) Regarding mitigation, the court gave no weight to the three offered statutory mitigating circumstances: (1) Perry had no significant history of prior criminal activity; (2) Perry was under the influence of extreme mental or emotional disturbance; (3) Perry's capacity to appreciate the criminality of his conduct or to conform his conduct was substantially impaired. (R3:401-404)(App. A) The defense offered 16 nonstatutory mitigating circumstances concerning Perry's abusive childhood, his hyperactive disorder, his good work history, his cooperation with the police after his arrest, his remorse, and his alcohol and drug addiction. (R3:404-406)(App. A) The court gave these nonstatutory mitigating circumstances little weight. (R3:408)(App. A)

Perry filed his notice of appeal to this Court on August 27, 1999. (R3:416)

The State's Case

John Johnston checked into the Motel 6 in Pensacola on the evening of February 20, 1997, around 8:00. (T2:277-283) He rented a single room with one double bed for one night and paid cash. (T2:278-281) Johnston presented a Texas driver's license bearing the number TX10621832 and wrote his vehicle tag as a

Texas number SD0517. (T2:281-282) He presented an AARP discount card. (T2:282) According to the motel clerk on duty, there did not appear to be anyone with Johnston, and the room was rented to one guest. (T2:280-282)

On February 21, housekeepers at the motel found the body of John Johnston in the bed in the room he had rented the previous evening. (T2:242-249) The head housekeeper looked into the room when advised that the occupant had not checked out. (T2:242-245) She saw someone in the bed with the covers pulled over them with just the feet exposed. (T2:247) She advised Steven Moss, the motel manager, that the room was still occupied. (T2:245) Moss was the first person to actually go into the room, and he discovered that Johnston was dead. (T2:250-253; T4:654-655) Once inside the room, Moss picked up the corner of the bedspread which covered the body. (T2:253) Although he did not see Johnston's head because a pillow covered it, Moss did see blood over the neck and chest area. (T2:253-254) A guest room key was beside the bed, and Moss picked it up. (T2:254) However, he realized he should leave it, and he replaced it. (T2:254) Moss called the sheriff's office. (T2:255)

Deputy Robert Martin arrived and secured the scene. (T2:261-266) Paramedic Mark Snowden observed the body and removed the pillow from the head but replaced it. (T2:269-276) Snowden

testified that he attempted to minimize disturbance to the scene. (T2:273-276)

Crime scene investigation revealed the body was covered with a pillow over the head, a bedspread, a blanket and a sheet. (T2:306, 322) The sheet was pulled up from the bottom of the bed, the victim's feet were exposed and the sheet was folded or bunched up over the torso. (State's Exhibits 1F,1J,1K,1L) The sheet had blood stains and cuts in it. (T2: 320, 322-323) There was blood on the bed and the walls. (T2:305-306, 329-332, 331-333) The victim's traveling bag, which had not been disturbed, was in the room on a chair. (T2:382-386; T6:972-974) Items of clothing were located beside the bed: a pair of pants(T2:326, 337); a pair of shoes (T2:326, 340); a T-shirt (T3:326); a rosary on the floor with the clothing and a medallion(T2:327, 342); a blue plaid shirt, which lay undisturbed under a chair next the undisturbed travel bag, with two envelopes in the pocket containing cash in the amount of \$1150. (T2:338-339, 383-386) Underneath the bed, a pair of pink panties was found. (T2:369-370) A crack pipe, which proved to have cocaine residue, was found just underneath the foot of the bed. (T2:327, 386-389) A pair of broken sunglasses was on the floor by the wall.(T2:328, 339) A towel was on the bathroom counter. (T2:330)

Dr. John Lazarchick, a forensic pathologist, came to the

scene to begin his examination. (T3:487-489) Lazarchick removed the sheet covering the body and did his first examination. (T3:490) A bedspread had been removed from the body prior to Lazarchick's arrival. (T3:522) The body was lying face up in the bed clad only in a pair of blue bikini underwear which the medical examiner pulled down to check body temperature. (T3:489, 521) Lazarchick noted an extensive amount of blood on the chest and neck regions. (T3:490) Based on his findings concerning rigor mortis, lividity and body temperature, Lazarchick estimated that death occurred 12 to 24 hours earlier. (T3: 490-493) When asked about semen later found on the bed sheet, Lazarchick said the presence of semen did not necessarily indicate sexual activity since sometimes semen can be expressed postmortem due to rigor mortis. (T3:492) Lazarchick also acknowledged that there had been no semen found in the underwear found on the body. (T3:530-532) An autopsy was performed on the following day. (T3:494)

During the autopsy, Lazarchick found and identified eight wounds, three incised wounds to the neck, four stab wounds to the chest, and one cut to the left thumb. (T3:499-514) The examination also revealed a contusion to the nose which Lazarchick said may have occurred just prior to death or much earlier at an event unrelated to the homicide. (T3:497-498, 529)

Using the medical examiner's numbers, wound #1 to the right side of the neck was approximately three inches long and a depth ranging from one quarter inch to one-and-a-half inches. (T3:500-501) The wound was consistent with having been made by a single-edged knife since one side of the wound had a blunt shape. (T3:501-502) Wound #2 paralleled wound #1, it was three-and-a-half inches long, and it ranged in depth from superficial to three-quarters of an inch. (T3:502) This wound severed the jugular vein and would have been fatal by itself. (T3:502) Wound #3 was a very superficial wound across the neck. (T3:504-505) Wound #4 was a stab wound to the central portion of the chest about two thirds of an inch long and penetrating through bone of the rib cage and into the pericardial sack. (T3:507) The wound exhibited blunt and sharp edges and would have required considerable force. (T3:507) Lazarchick stated this wound, alone, would have potentially caused death. (T3:508) Wound #5 was also a stab wound in the middle part of the chest. (T3:510) This wound went between the ribs, entered the heart and would have been fatal. (T3:510) Lazarchick said this wound also exhibited sharp and blunt edges. (T3:510) He explained that the sharp edge shape would have been from the cutting portion of the blade and the blunt shape would have been caused by the area at the hilt of the knife where the blade joins the handle. (T3:510)

Wound #6 was a stab wound to the chest to the lateral left side. (T3:511) This wound also had the blunt and sharp edges. (T3:511) The path of the wound went between the ribs and entered the left lung. (T3:511) Injuries from this wound may have been fatal without medical treatment. (T3:511) Wound #7 was a very shallow wound which Lazarchick described as an attempted stab wound. (T3:512) Wound #8 was a superficial incised wound to the thumb which was consistent with a defensive wound. (T3:514)

Lazarchick rendered no opinion on the exact sequence or timing of the wounds, although he thought the stab wounds probably preceded the neck wounds. (T3:530, 535-537) He was of the opinion that these wounds were administered rapidly -- within 20 seconds and not longer than 25 seconds. (T3:533-534) Death would have occurred within five minutes from these wounds. (T3:517, 534) Lazarchick testified that these wounds would have been painful while Johnston was conscious. (T3:515-516) These wounds would have produced unconsciousness and eliminated the victim's ability to feel pain within one minute. (T3:517)

Laura Rousseau from FDLE tested for presence of hairs, fibers latent fingerprints and semen on the body and for blood in the motel room. (T3:419-438) Using a lumalite process, fibers were found and collected from the body. (T3:421-422) No fingerprints or semen were detected using this process. (T3:422-

423) She conducted a presumptive test for blood in the motel room using luminol and phenolphthalein. (T3:423-425) In the bathroom, Rousseau found one area with a reaction for the presumptive tests for blood. (T3:424-425) The sink and counter tops had too much fingerprint powder on them to test for blood. (T3:425) On the two walls by the bed with visible stains, testing with luminol produced a reaction for blood. (T3:426)

Janice Johnson, an FDLE crime laboratory analyst, examined the blood splatters found at the scene. (T4:718-771) Based on her review of crime scene photographs and evidence, Johnson rendered an opinion that the injuries producing bloodshed occurred on the bed of the motel room. (T4:725) She could not determine the sequence or timing of the wounds. (T4:747-750) Johnson acknowledged that there was a blood splatter on the underside of the bottom of the bedspread. (T4:750-754) She could not tell how the bedspread was positioned and could only say that the underside was facing upward. (T4:754)

Christina Sanders, a fiber analyst, testified about the cuts found in the sheet. (T4:656-666) She found eight holes in the top part of the sheet. (T4:659) After making a series of test cuts with different implements for comparison purposes, Sanders concluded that the holes in the sheet were made by a sharp bladed implement. (T4:660-666)

One latent fingerprint belonging to Leo Perry was recovered from the inside of a Motel 6 soap wrapper. (T4:635-641) No other latent prints of value were lifted at the motel room. (T4:640-641)

Serology and DNA testing was performed on various items of evidence. Leo Perry's DNA was discovered from a blood stain on a towel found in the motel room and from a Marlboro cigarette butt found in the room.(T4:684-687, 708-713) John Johnston's DNA was found on blood stains found on the bedspread, bed sheet, and a light switch plate from the motel bathroom. (T4:677-679, 683) A semen stain found on the bottom bed sheet matched Johnston's DNA. (T4:679-680) There was no blood or semen found on the blue bikini underwear Johnston wore. (T4:676-677) Testing on the pink panties found under the bed proved to have a semen stain and two different DNA strands which was inconsistent with both Perry and Johnston. (T4:680-683)

Audrey Black and her husband rented the room next to Johnston's room at the Motel 6 at the time of the homicide. (T2:288-289) They checked into the room around 5:00 p.m. on February 20, 1997. (T2:289) During the night, Black heard noises from the room next door. (T2:290) She first heard a sound as if someone fell out of bed and then muffled noises around 4:00 a.m. which would have been February 21. (T2:290, 294) Black

explained that she often awakens during the night and has difficulty going back to sleep. (T2:296-297) Shortly after the muffled noises, Black heard a lot of banging sounds from the room. (T2:291) After another brief time, she heard someone walking swiftly and heavily across the floor and then the door slammed. (T2:291) Black looked out of the window and saw a man standing on the driver's side of a white pick-up truck. (T2:291) The truck was parked one car away from the Black's own vehicle which was parked directly in front of Black's room. (T2:292) The man unlocked the truck and got inside. (T2:293) Once inside the truck, the man fell sideways onto the seat. (T2:293) He was in that position for a minute. (T2:293, 300) According to Black, he then seemed to jump up, start the truck, back out of the space, and drive away. (T2:293, 300) She thought he seemed like he was in a hurry. (T2:293) Black did not think the man seemed intoxicated, and he seemed sure of the things he did. (T2:300) From the time she first heard the noises until the man drove away, Black estimated the time to be 20 minutes. (T2:294) On cross-examination, Black agreed that she told the police investigator it was a very short period of time and that her recollection was probably better at the time she gave the investigator the statement. (T2:298) In court, Black said that Leo Perry looks similar to the man, but she could not be

positive of her identification. (T2:295)

Ernest Burrs, Jr., a patrolman with the Florida Highway Patrol, stopped a white Chevrolet pick-up truck for speeding in Palm Beach County. (T3:566-567) Ricardo Guzman was driving the truck and his brother, Miquel Guzman was a passenger. (T3:568) Ricardo Guzman produced a Florida ID card and a Texas registration for the truck. (T3:568) Burrs noted that the truck had a Florida plate. (T3:568) Burrs ran checks on the ID card and the Florida plate and vin number of the vehicle. (T3:569-570) He learned that Guzman had a suspended license and the truck was reported stolen. (T3:569-570) Ricardo Guzman testified that he obtained the truck from a man he met at a service station in Lake Worth. (T4:591, 594-595) Guzman was a known crack cocaine dealer in the community. (T4:603) The man approached Guzman and asked if he wanted to rent the truck. (T4:595-596) In the drug trade, this meant he wanted to loan the truck for a couple of hours in exchange for drugs. (T4:596) The man wanted crack, but Guzman did not have any. (T4: 596, 603-604) Guzman gave the man \$20 to use the truck. (T4:596) When Guzman returned with the truck, the man could not be found. (T4:597) Guzman kept the truck and changed the tags. (T4:599-600) Both Guzmans were arrested and the truck was impounded. (T3:570-575) The Escambia County Sheriff's Office secured the

truck the next day. (T3:575; T4:606-608) With the help of Ricardo Guzman, the paperwork for the truck, the Texas tag which had been on the truck and a plaid jacket from the truck were recovered. (T4:609-612) The truck belonged to John Johnston. (T3:447-449) Leo Perry's fingerprints were later discovered on a plastic bag found in the truck. (T4:650-651) Johnston's DNA was found on a stain on blue jeans recovered from the truck. (T4:687)

Leo Riley, the manager of a motel in Lake Worth, testified that a man staying in his motel drove a white truck similar to the truck seized from Guzman. (T3:559-560) The man stayed with another man, Dee Taylor, who rented a room by the week. (T3:560-562) Riley described the man with the truck as five feet eight or nine inches with medium-length hair and a mustache. (T3:561) He identified someone in court as looking similar to the man. (T3:561-562) The second night, Riley noted that the man no longer had the truck. (T3:562-563)

Janice Effiger of Western Union Financial Services testified that records showed wire transfers of money to Leo Perry in February 1997. (T3:543-549) There were three transfers dated February 21, 23 and 26. (T3:545-547) All three were picked up and cashed in Lake Worth. (T3:545-547)

On November 5, 1997, Leo Perry was arrested in New Orleans.

(T4:617-620) Escambia Sheriff Investigators John Sanderson and Tracy Yuhasz transported Perry back to Escambia County. (T3:451-455) Sanderson interviewed Perry during the drive back, and Yuhasz sat in the back seat of the car taking notes. (T3:454-455, 472) Perry said he was hitchhiking south from Chicago, and Johnston picked him up somewhere in Alabama and gave him a ride. (T3:459) They stopped in Pensacola and stayed at the Motel 6. (T3:459,463) Perry said Johnston was not a heterosexual. (T3:458) While in the room, Perry said Johnston at one point tried to get into the shower with him. (T3: 458) There was no mention of any other sexual advance or assault. (T3:458-459) Perry said he cut Johnston with a boot knife. (T3:461) Before this happened, Perry had been in a bar all night with two women whom he did not know who drove him back to the motel. (T3:459) Perry was able to point out the bars he spent time in that night. (T3: 474-476) He told Sanderson that the crack pipe found in the room was probably his. (T3:460) He was on crack at the time but he was not smoking crack at the time of the homicide. (T3:460-462, 477-479) According to Sanderson, Perry said he took Johnston's wallet from the room and drove south in the truck eight or nine hours, stopping in Lake Worth. (T3:461, 481) Perry threw the wallet out on a ramp at Interstate 10. (T3:461,480)

The Defense's Case

Leo Perry testified in his own defense and related the circumstances of his involvement in the homicide of Johnston. (T5:799-963) Perry was born in 1969, and since he was 14-years-old, he had worked with traveling carnivals and shows. (T5:800-804) Starting as a "ride jockey", Perry later had more responsible jobs requiring supervision of other workers in the setting up and operation of the rides. (T5:804-805) For the year preceding his trip to Florida, Perry worked as ride superintendent for Midways Shows in Chicago. (T5:805-805) Because the winter months were slow for this work in the north, Perry left Chicago for Homestead, Florida where he had work available. (T5:805-806, 813-814) He hitchhiked. (T5:806-807) Johnston gave Perry a ride somewhere in Alabama on the morning of February 20, 1997. (T5:807-808)

During the ride, Johnston talked to Perry asking him about his life and discussed politics. (T5:808-809) Perry learned that Johnston used to teach school. (T5:809) They stopped at a Waffle House, where Johnston bought Perry a meal. (T5:810) Johnston paid for the meal with money he took from his shirt pocket. (T5:811-812) Perry said he left Chicago with \$68 and had about \$50 when Johnston gave him a ride. (T5:810-811) Later, they stopped for fuel, but Perry did not see Johnston paying since

Perry operated the pump. (T5:812-813) Perry napped periodically during the trip, and after dark, Johnston awoke him and said he planned to stop in Pensacola for the night. (T5:813-815) Johnston offered to allow Perry to stay in his motel room for the night if he wanted to ride further with him the next day. (T5:814-815) Perry accepted. (T5:815) They stopped at a Motel 6 and Johnston rented a room. (T5:815) Perry did not see the rental transaction and did not know how Johnston paid for the room. (T5:816) Johnston told Perry that he rented a room with one bed, and Perry could sleep on the floor. (T5:816) Perry had his sleeping bag with him and readily agreed to that arrangement. (T5:816)

The room was small, and Perry placed his traveling bag along the wall underneath the television. (T5:817) He thought Johnston brought one bag inside. (T5:817-818) Perry wanted to shower, and he took his shaving kit and change of clothes to the bathroom. (T5:819) While Perry was in the shower, Johnston came in to use the restroom. (T5: 820) He flushed the toilet and went to the sink area. (T5:820-821) Perry thought Johnston was waiting for him to get out.(T5:821) At that time, Johnston approached the shower. (T5:821) Perry put his hand up and just touched Johnston and said he would be out in a few minutes. (T5:821) Johnston nodded and left. (T5:821) Perry stepped out of

the shower and shaved. (T5:821-822) He cut himself and used a towel to wipe blood from his neck. (T5:822) Perry told Johnston the he was going to a convenience store to buy cigarettes, and he left the room. (T5:822)

After buying beer and cigarettes at the convenience store, Perry walked to the Cougar Bar. (T5:832-827) He arrived around 9:00 p.m. (T5:826-827) Perry drank two more beers and began shooting pool for shots of Tequila. (T5:827-828) His pool game was successful, and he won six to eight shots of Tequila, which he followed with three to four more beers. (T5:828-829) A man he met then offered to sell Perry Xanax, and Perry bought five or six pills. (T5:829-830, 834-835) Perry admitted that he had an alcohol dependency and was addicted to amphetamines and crack cocaine. (T5:830-833) He continued to drink and play pool until he left the bar between 11:30 and 12:00. (T5:836)

The girlfriend of a man Perry met at the bar wanted to buy a portable CD player Perry owned. (T5:836) They drove him back to the motel to get the player. (T5:836) Johnston was still awake watching television and opened the door when Perry knocked. (T5:837) Perry sold the CD player for \$10. (T5: 838) The man and his girlfriend told Perry they could not give him a ride to another bar and they drove away. (T5:838) Perry decided to walk to the bar, and before he left, Johnston had him take

the room key with him. (T5:838-839)

At this point, Perry was intoxicated. (T5:840) He started walking to the Silver Eagle Saloon. (T5:839-840) When he reached the bar, he found one man shooting pool and another sitting at the bar. (T5:841) He became acquainted and shot pool for drinks. (T5:841) The man he played with asked Perry if he smoked crack. (T5:841) He and Perry walked outside and shared a \$20 piece of crack. (T5:842) They continued to play pool and drink. (T5:842-843) Perry asked about obtaining more crack. (T5:844) He and the man started walking through some woods to Escambia Arms. (T5:844) However, when they heard gunfire, they turned around and came back. (T5:844) Two women had driven up to the bar, and the man told Perry that they would know where to buy crack. (T5:844-845) Perry chipped in a few dollars and went with them. (T5: 845-846) They eventually found crack to buy, and Perry rode around with the women drinking beer they had in the car and smoking cocaine. (T5:845-849) He used a metal crack pipe the man at the bar had given to him earlier. (T5: 847-848) Perry said he probably smoked \$30 to \$35 worth of their crack and drank several beers. (T5:846-849. 852) The women drove Perry to the motel parking lot. (T5:849,851-852) Perry drank one more beer, and when he got out of the car, he stumbled and fell. (T5:851-852) According to Perry, the effects of drinking

alcohol, taking Xanax and smoking crack was like being on a roller coaster -- one minute he felt paranoid and the next minute he wanted to sleep. (T5:850)

Once Perry reached the room, he pounded on the door to awaken Johnston to let him inside. (T5:852-853) Perry had forgotten that he had a room key. (T5:853) Johnston was somewhat upset. (T5:853) Perry used the bathroom, left the bathroom light on and unrolled his sleeping bag on the floor next to the wall at the foot of the bed. (T5:853) The room was small, but there was just enough room to walk between the foot of the bed and Perry's sleeping bag. (T5:855) He used his duffle bag for a pillow. (T5:853-854, 856) Although Perry could not specifically remember all of his actions, he said his habit while sleeping on the road was to empty his pockets and put items on the side of his bag next to the wall. (T5:856) He also would place his boot knife in the same location. (T5:856) The boot knife was a double-edged knife with a two to three-inch-blade and a sheath designed to clip inside the top of a boot. (T5:856) Perry carried the knife in his boot for protection since his job sometimes required him to carry large sums of cash when he picked up money boxes from the carnival rides. (T5:856-857)

After Perry had been asleep for a time, he awoke to find

Johnston standing next to him: Johnston was masturbating with his penis close to Perry's face. (T5:863-865) Perry reacted and jumped up. (T5:864) Because he was still under the effects of his intoxicated state and just awakened from sleep, Perry did not recall exactly what happened. (T5:863-867) He did not remember ever striking Johnston. (T5:865-866) Perry's next memory is sitting in a chair in the room, holding his knife with blood on his hands. (T5: 863-869) Johnston was in the bed covered with blood. (T5:868-869) Perry did not remember what he did, he was feeling paranoid because of the cocaine use and intoxication. (T5:869) He covered Johnston's face with a pillow and pulled the blanket and bedspread over the body. (T5:869-870) He was in a panicked state: the only thing on Perry's mind was to leave. (T5:870, 877) He washed his hands, threw his belongings in his duffle bag and placed them by the room door. (T5:870) He saw the keys and ignition security chip to Johnston's truck on the end table. (T5:870) He grabbed them and went out the door. (T5:870) Perry did not go through Johnston's luggage or property even though he had seen Johnston take cash from his shirt pocket. (T5: 872, 876) He said that he found Johnston's wallet later in the glove compartment of the truck. (T5:872-873, 875-876) He took the \$60 he found in the wallet. (T5:875-876) Somewhere along the highway, Perry discarded the

knife. (T5:874)

Perry drove the truck south stopping in Lake Worth which was an area he knew. (T5:877-880) He rented the truck to Guzman in order to buy drugs, and he never again saw the truck. (T5:883-886) He worked in a labor pool for awhile and then started traveling with carnivals and shows in Florida, New Jersey and New York. (T5:887-889) In November, Perry was arrested in New Orleans. (T5:889-891)

Prosecution's Rebuttal

The State called Dr. Harry McClaren, a clinical psychologist, to testify. (T6:997) McClaren, who had never examined Perry, was allowed to remain in the courtroom during Perry's direct examination. (T5:781-791) McClaren then based his testimony, in part, upon Perry's testimony, along with a review of depositions and police reports. (T6: 999-1000) The prosecutor asked McClaren if the defendant was able to engage in purposeful or intentional behavior the night of the homicide. (T6:1000) McClaren opined that he could. (T6: 1000-1002) McClaren stated that alcohol dependence, cocaine addiction and barbiturate addiction are classed as specific mental disorders. (T6:1008) Based on the amount of alcohol, crack cocaine and Xanax Perry said he consumed, McClaren said Perry would be intoxicated, but he could make decisions. (T6:1008-1009)

McClaren stated that among persons who heavily consume alcohol, "blackouts" or alcohol amnesic experiences are common. (T6:1009-1010) The person would have no recall of his or her behavior during the blackout period. (T6:1010) Because of Perry's alcohol use, McClaren said Perry could have had such a blackout. (T6:1010) McClaren further stated that, based on his review, there was nothing to indicate that prior to the event Perry had formed a specific intent to kill. (T6:1010-1011)

Melissa Perry, Leo Perry's ex-wife, said Perry called her from jail after his arrest. (T6:1014-1015) She asked him what had happened. (T6:1018) He told her that he was scared to talk over the telephone. (T6:1018) He did tell her that while he was taking a shower getting ready to go out to some bars, the man tried to get in the shower with him. (T6:1015-1016, 1018) They had an altercation, and Perry said he did not remember later events. (T6:1018) The only other thing Perry told her was that when he realized Johnston was dead, he panicked, took the keys, and left. (T6:1019)

A long-time friend of Johnston's, Louis Ellis testified that he had known Johnston since 1947. (T6:1024) Johnston lead a very private life, but Ellis never had any indication that Johnston was a homosexual. (T6:1025-1027) Ellis had not seen Johnston often during the last 10 to 15 years since Johnston was

teaching at a different school. (T6:1027-1028) When Johnston retired, Ellis would see him about once a month for a lunch or dinner. (T6:1028-1029) William Johnston, John Johnston's brother, testified that he never saw indications that his brother was a homosexual. (T6:1030-1032) Audrey Black, the motel guest in the room next door to the crime scene, testified that she did not hear anyone pounding on the room door of the adjacent room. (T6:1036-1037) She admitted that she was not awake all night and did sleep for a time. (T6:1037)

Tracy Yuhasz, who took notes of the interview Investigator John Sanderson conducted of Perry, said her notes reflected that Perry said he took the wallet from the room, and he did not mention that the victim stood over him masturbating. (T6:1040-1042) Her notes also reflected that Perry said he cut the victim with a boot knife. (T6:1042) Yuhasz stated that the car in which they were traveling was equipped with device for making audio recordings, but the device was not activated. (T6:1045) She admitted that an audio recording would have been beneficial. (T6:1045)

Penalty Phase

The State called four witnesses at the penalty phase of the trial. Three witnesses testified to victim impact information.

William Johnston, a brother, said that John Johnston was a

retired teacher who lived a private life. (T7:1315-1323) However, his brother liked people and was kind and generous to his family and to those less fortunate than himself. (T 7:1315-1323) Louis Ellis, a friend, stated that he was always impressed by the extent of Johnston's assistance to his family members. (T7: 1223-1325) Thomas Hassell, a nephew, testified that his uncle was an inspiration and helped him and his brothers and sisters financially. (T7:1325-1328) Melissa Perry, Leo Perry's ex-wife, testified to her experiences and observations during their marriage. (T7:1289-1312)

The prosecutor asked Melissa Perry, if during her marriage to him, Perry would be violent or was involved in violent activity. (T7:1288-1289) Defense counsel objected on the ground that this subject was not an issue at trial. (T7:1289) The court overruled the objection. (T7:1289) At that point, the prosecutor asked Melissa to recount some specific instances of violent behavior. (T7:1289) Melissa related an incident where Leo beat up a friend requiring him to go the hospital for treatment. (T7: 1289-1292) The friend, Steve, was staying with Melissa and Leo in a house Leo rented. (T7:1289-1290) Leo and Steve had been drinking. (T7:1290) Melissa said that Leo tended to become violent when drinking. (T7:1290) Steve and Leo began arguing and yelling at each other. (T:1290) Leo started hitting and kicking

Steve. (T7:1290) Steve was too drunk to stand up. (T7:1290) Leo dragged Steve into the house and beat him until he was unconscious. (T7:1292) Leo pushed Melissa against the fireplace. (T7:1292) The police arrived and called an ambulance for Steve. (T7:1292) On cross-examination, Melissa said that Leo was a kind, sweet person when not drinking. (T7:1302) She also said there were times when Leo could not remember what he did when drunk. (T7:1302-1303) The defense later recalled Melissa as a defense witness to add that the fight with his friend, Steve, was one of the incidents that Leo could not remember. (T7: 1328-1332) She said Leo passed out that night. (T7:1330) When he awoke, Leo saw Steve in the living room and asked him what had happened to him. (T7:1331) When Steve told him, Leo walked to the other room momentarily and then returned and repeatedly apologized to his friend. (T7:1331-1332)

Over defense relevancy objections, the State also asked Melissa Perry if Leo owned and carried knives. (T7:1293) She said that Leo used to keep and trade knives. (T7:1293) He used a boot knife and, for a time, carried a machete in the car. (T:1293) The prosecutor asked if Leo ever talked about how a knife could be used to kill someone. (T7: 1294) After the court overruled the defense relevancy objection, Melissa said that she was scared of some of the knives because they were big.

(T7:1294) Leo told her that a large knife was not needed to kill someone because a small knife could cut the jugular vein causing death quickly. (T7:1294) Melissa stated that this conversation occurred no later than 1991, since she and Leo separated in February of 1991. (T7:1296)

Melissa Perry stated that Leo was around 19 years-old when they met. (T7:1304) She understood that he had been in a juvenile home until he was almost 18 because of an abusive stepfather. (T7: 1305) Leo's mother told Melissa that Leo's stepfather treated him much differently than he did his natural son. (T7:1305-1306) Leo had been on Ritalin as a child. (T7: 1305-1306) Melissa knew that Leo had an alcohol and drug dependency when they met. (T7: 1303) The problem became worse later in the marriage. (T7:1303-1304) Melissa tried without success to convince Leo to attend AA. (T7:1307) She said that Leo was a loving, caring person when he was not drinking. (T7:1302-1303)

Leo Perry testified in his defense about his background and youth. (T7:1333) He was born on April 2, 1969, in Ohio. (T7:1333) His mother, Martha Osborne, divorced his father before Leo was two-years-old, and Leo did not remember his father. When he was 15, Leo met his father. (T7:1333) Leo's mother remarried. (T7:1334) Leo felt he had a bad home life with his

stepfather, Jerry Alcorn. (T:1334-1342) Alcorn acted as if Leo could do nothing good enough. (T7:1335) Leo remembered being disciplined by whippings with a belt or paddle; frequent slaps; standing against doors; being locked in a closet; and when Leo was older, actual fist fights. (T7:1335-1336) There was some altercation between them everyday. (T7:1336) Leo received Ritalin for hyperactivity. (T7:1337) He was a B/C student. (T7:1337) The family lived in a rural, farming area, and transportation problems made it difficult for Leo to participate in school activities. (T7:1337) Leo started doing farm work as a child. (T7:1338)

When Leo was about eight-years-old, he was sent to a children's home in Mississippi. (T7:1339-1340) He and his stepfather were having problems, and his stepfather asked the court to find a place for Leo. (T7:1340) A counselor found this private, Baptist children's home in Mississippi. (T7:1339-1340) Leo described the home as a combination work camp and military school. (T7:1339) The children arose at 5:00 a.m. to work in the fields before going to school. (T7:1339) Anything eaten at the school was raised or grown at the school or obtained through a sharecropping arrangement with local farmers. (T7:1339) The school divided the girls and boys from each other with a high block wall. (T7:1340) Leo said he did not recall talking to a

girl while at the school. (T7:1340) He left the school and returned home when he was 14 or 15. (T7:1340) He was behind in school and home life with his stepfather was no better than his earlier experience. (T7:1341) Leo left home and worked briefly on a farm in Kentucky. (T7:1341-1342) After leaving the farm, Leo began working for carnivals and learned the business. (T7:1342) He moved up to the point he was supervising over 20 employees and was responsible for the transportation, set-up and inspection of the all of the rides. (T7:1342-1344) Leo did not remain in contact with his family, and had had no contact with his mother for nine years until they reconnected after his arrest. (T7:1351-1352)

Leo met his ex-wife at a fair where he was operating a ride. (T7: 1345) They married and Leo tried to establish himself and make a home. (T7:1345) They had two children, Amber Marie and Casey Ann. (T7:1346) There were difficulties. (T7: 1345-1346) Leo and Melissa had arguments. (T7:1356) Leo admitted that he was not always the best father. (T7: 1356) He also admitted that he did not seek help for his alcoholism during the marriage since he did not realize his problem at the time. (T7:1356-1357)

Regarding the incident with his friend, Steve, Leo said the two of them had been drinking and had an argument which lead to an altercation. (T7:1346-1349) After the beginning of the

altercation, Leo had no memory of what happened. (T7: 1349-1350) Both Melissa and Steve told him that he went into a rage, but he had no recall of that happening. (T7:1349-1350) He and Steve remained friends. (T7:1350) Leo said that he had other instances of loss of memory of events which occurred while he was drinking. (T7:1350)

Jacqueline Scott met Leo while working with an amusement company on Long Island during the summer of 1997. (T8:1383) They formed a friendship which became a romantic relationship. (T8:1384-1385) During the months Scott was around him she never saw him drunk. (T8:1386) She found Leo to be a good, hard-working and trustworthy person. (T8:1386, 1388)

Martha Osborne, Leo Perry's mother, testified by telephone because a medical condition made travel difficult. (T8:1470) She said she was married to Leo's father for five years and divorced him and remarried to Jerry Alcorn when Leo was two-years-old. (T8: 1445-1447) She eventually divorced Alcorn. (T8: 1448) Jerry Alcorn was mentally and physically abusive to Leo. (T8:1448-1454) Osborne thought part of the problem was that Leo was not Alcorn's own son. (T8:1453) Even when Leo was young, his stepfather would beat him with a belt or wooden paddle. (T8:1448-1449) Alcorn would scream at Leo and slap him. (T8:1448-1449) Within a seven day period, Alcorn would

physically abuse Leo at least five times. (T8:1449) Although not every incident would leave a bruise, he would hit Leo. (T8:1449) Alcorn was verbally abusive on a constant basis. (T8:1449-1450) He would scream at Leo and stand him in a corner for an hour. (T8:1451) On two occasions, social services became involved when Leo went to school with a black eye and when Osborne's sister called the services after observing Alcorn hit Leo in the face. (T8:1451-1452) When Leo was 13 or 14, he and his stepfather argued over how Leo was supposed to cut the grass. (T8:1449-1450) Leo went upstairs in the house and tried to commit suicide by hanging himself with an electrical cord. (T8:1450)

Osborne said Leo had trouble in school because he was hyperactive. (T8:1452) He started taking Ritalin in kindergarten. (T8:1452) He was not learning in school. (T8:1454) There were fights at school, and incidents where Leo destroyed property at home. (T8:1455, 1464) Osborne said there were times Leo would become so angry that he would lose his breath. (T8:1469) When Leo was either eight or ten-years-old, he was placed in a children's home in Mississippi. (T8:1455-1456) Osborne could not remember how old he was when sent there, and she thought he was there about two years. (T8:1462-1463) After Leo returned home, he began to run away as a young teenager. (T8:1456-1457) He came back home twice because he was

ill. (T8:1457-1459) Once when Leo was 15-years-old he came back from Kentucky to recover from illness due to his drug abuse. (T8:1457-1458) Another time, Leo came home after a motorcycle accident hospitalized him for two months with various injuries, including a head injury which left him with slurred speech for a time. (T8:1458-1459)

Dr. Douglas Fraser, a psychiatrist who also has certification in psychopharmacology, testified to his examination and evaluation of Perry. (T8:1390-1435) Fraser reviewed police reports and depositions as well as interviewing Perry. (T8:1394) He reached several opinions. (T8:1397) Based on this information, Fraser concluded that Perry suffered a neuroaggressive disorder episode at the time of the homicide. (T8:1398-1399)

Fraser relied on the *American Psychiatric Press Textbook of Psychopharmacology* to explain this behavior disorder. (T8:1398) Neuroaggressive behavior is agitation and aggression. (T8:1400) This behavior disorder is characterized by impulsive, short term aggressive and hostile acts -- it begins quickly and it leaves quickly. (T8:1401) Extremely minor circumstances, events or gestures can trigger the onset. (T8:1401-1402) One cause could be the ingestion of medication or substances, including alcohol, cocaine and benzodiazepines such as Xanax.

(T8:1400-1401) Fraser stated that the disorder could be especially caused by a combination of these substances.

(T8:1402)

Based on the amount and combination of alcohol, cocaine and Xanax Perry reported to have consumed, Fraser was of the opinion that Perry experienced a neuroaggressive disorder episode.

(T8:1400-1405) Contributing to this diagnosis was the underlying attention deficit disorder Perry suffers, since this disorder causes impulsive behavior. (T8:1403) Fraser thought that Perry's history of childhood abuse could also be a contributing factor.

(T8:1405-1406) Fraser was of the opinion that Perry was under the influence of an extreme mental or emotional disturbance based on his ingestion of alcohol, cocaine and Xanax leading to a neuroaggressive, agitated-aggressive episode. (T8:1408) Fraser also concluded that Perry's ability to appreciate the criminality of his conduct or to conform his conduct to legal requirements was substantially impaired. (T8:1408) In Fraser's opinion, while Perry suffered this episode which could last only seconds, he would not be doing anything which he premeditated or thought about even for an instant. (T8:1409) Fraser also concluded that Perry could have experienced a loss of memory of the events. (T8:1409) Intoxication due to the intake of alcohol, cocaine and Xanax could lead to such amnesia. (T8:1409)

SUMMARY OF ARGUMENT

1. The evidence presented was insufficient to support a first degree murder verdict under either a premeditation or felony murder theory of prosecution. Perry's confession and trial testimony established a reasonable hypothesis that the killing was the unintentional product of Perry's impulsive overreaction to a perceived threat while he was under the influence of alcohol and cocaine. The State's circumstantial evidence was insufficient to prove premeditation and it did not refute the evidence establishing an unintentional homicide. Perry had no intent to commit a robbery or theft at the time of the homicide. In both his confession and his trial testimony, Perry said he took the truck and wallet as a means to flee the scene of the homicide. The taking of the truck and wallet was an afterthought, and the evidence did not support the conclusion that homicide was committed during a robbery.

2. During the jury selection questioning, defense counsel attempted to inquire of prospective jurors whether they understood that the life sentence option for a first degree murder was without parole eligibility. The prosecutor objected on the grounds of relevancy, and the trial court sustained the

objection. The trial court's ruling unconstitutionally restricted Perry's right to examine prospective jurors and impaired his ability to select a fair and impartial jury to hear his case.

3. The State's first witness during penalty phase was Perry's ex-wife, Melissa Perry. At the beginning of direct examination, the prosecutor asked Melissa, if during her marriage to Leo Perry, he would be violent or was involved in violent activity. This same line of inquiry continued into the prosecutor's redirect examination. Defense counsel objected on the ground that this subject was not relevant. The court overruled the objections. Melissa testified to some specific instances of violent behavior. The evidence was not relevant to any of the enumerated aggravating circumstances, and it was highly inflammatory and intended to prejudice the jury. This Court has held admission of such evidence in penalty phase to be reversible error.

4. The evidence in this case was insufficient to establish the heinous, atrocious and cruel aggravating circumstance. According to the trial court's findings and the trial testimony, the medical examiner concluded that the wounds occurred rapidly and the victim lost consciousness within one minute and could no longer feel pain. The court erroneously instructed the jury

that it could consider the HAC circumstance on such facts. Additionally, the trial judge improperly found HAC as an aggravating circumstance. The jury and the trial court improperly considered the HAC circumstance rendering Leo Perry's death sentence unconstitutional.

5. The evidence presented in this case was insufficient to establish the cold, calculated and premeditated aggravating circumstance. The trial court erroneously instructed the jury that it could consider this circumstance. In his findings of fact to support the death sentence, the trial judge improperly found CCP as an aggravating circumstance. The homicide was the product of a spur-of-the-moment, impulsive act likely the result of panic or rage while Perry was under the influence of alcohol and crack cocaine. There is no evidence that Perry planned the homicide, committed it with a calculated method or acted after a time of cold reflection as the circumstance requires. Leo Perry's death sentence has been unconstitutionally imposed due to the jury's and the trial court's erroneous consideration of the CCP aggravating circumstance.

6. The evidence presented in this case was insufficient to establish the aggravating circumstance that the homicide was committed during the course of a robbery. The trial court erroneously instructed the jury that it could consider this

circumstance and erroneously found this circumstance in support or the death sentence. Leo Perry's death sentence has been unconstitutionally imposed due to the jury's and the trial court's erroneous consideration of this aggravating circumstance in reaching a sentencing decision.

7. During the penalty phase charge conference, Perry submitted a special requested instruction which would have advised the jury that its sentencing recommendation was entitled to great weight. He based his request on Caldwell v. Mississippi, 472 U.S. 320 (1985), where the Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments. The trial court denied the request and the instruction given in this case violates Caldwell, and the Eighth and Fourteenth Amendments to the United States Constitution.

8. In performing proportionality review, this Court evaluates the totality of the circumstances and compares the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. Such a review in this case demonstrates that this case does not involve one of the most aggravated and least mitigated of murders. The three aggravating circumstances the

trial court relied upon were not proven beyond a reasonable doubt. Since this leaves no valid aggravating circumstances, Perry's death sentence cannot stand. Even if the State's theory of prosecution was proven and that this homicide occurred during a robbery, the death sentence remains disproportionate based upon this Court's prior caselaw.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL TO BOTH PREMEDITATION AND FELONY MURDER THEORIES SINCE THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATION OR THE ALLEGED UNDERLYING FELONY OF ROBBERY.

Premeditation Theory Insufficient:

The State's evidence failed to prove the premeditation theory for first degree murder, and the trial court should have granted Perry's motion for judgement of acquittal on the premeditation theory. (T5:777-780; T6:1046-1047) Perry's confession and trial testimony was that the killing was the unintentional product of Perry's impulsive overreaction to a perceived threat while he was under the influence of alcohol and cocaine. (T3:454-480; T5:799-963) Even the State's expert witness, Dr. Harry McClaren, testified that, based on his review of Perry's behavior and the circumstances, there was nothing to indicate that Perry formed a specific intent to kill before the act. (T6:1010-1011) The State's circumstantial evidence is insufficient to prove premeditation, and it does not refute the evidence establishing an unintentional homicide.

Premeditation requires a conscious intent to kill before the killing. Sec. 782.04(1)(a)(1), Fla. Stat. The element of premeditation is

...more that a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must also exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Wilson v. State, 493 So.2d 1019, 1021 (Fla. 1986); see, also, Randall v. State, 25 Fla. Law Weekly S317, S320 (Fla. 2000). As defined in the Standard Jury Instructions for Criminal Cases, premeditated murder is a

...killing after consciously deciding to do so. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

Standard Jury Instr. (Crim. Cases). When the State relies on circumstantial evidence to prove premeditated murder, as it did in this case,

...a motion to acquit as to such murder must be granted unless the State can "present evidence from which the jury can exclude every reasonable hypothesis except that of guilt." Kirkland v. State, 684 So. 2d 732, 735 (Fla. 1996) (quoting State v. Law, 559 So. 2d 187, 188 (Fla. 1989)). Indeed, if "the State's proof fails to exclude a reasonable hypotheses [sic] that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained." Hoefert v. State, 617 So. 2d 1046, 1048 (Fla. 1993).

Kormondy v. State, 703 So.2d 454, 459 (Fla. 1997); see also, Randall v. State, 25 Fla. Law Weekly S317, S320 (Fla. 2000);

Fisher v. State, 715 So.2d 950, 952 (Fla. 1998); Norton v. State, 709 So.2d 87, 92-93 (Fla. 1997); Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997).

The State's evidence in this case failed to exclude the reasonable hypothesis that this was an unintentional killing and the product of an overreaction and an impulsive act. Perry's confession and trial testimony consistently indicated that he had no intent to kill anyone. (T3:454-480; T5:799-963) Evidence of multiple stab wounds, alone, does not prove premeditation. This is especially true, when there is other evidence which refutes premeditation. See, Kirkland v. State, 684 So. 2d 732 (Fla. 1996); Coolen v. State, 696 So.2d 738 (Fla. 1997).

In Kirkland, the defendant used a knife to slash the victim's throat "many" times, causing a deep , complex wound that cut off her breathing and produced a great deal of bleeding, causing her death by sanguination or suffocation. Kirkland apparently also beat the victim with a walking cane, causing blunt trauma wounds. There was evidence of sexual friction between Kirkland and the victim before the attack. However, this Court looked at the total record and rejected premeditation as a matter of law because of "strong evidence militating against a finding of premeditation." 684 So. 2d at 732. The Court found "there was no suggestion that Kirkland

exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide." Ibid. at 735.

Just as in Kirkland, the evidence of premeditation in the present case is insufficient. The defendant in Kirkland caused many wounds with two different weapons. Perry used one weapon and the wounds were the product of a frenzied, quick attack, lasting seconds. (T3:533-534) Furthermore, Perry was reacting to a perceived threat while he was under the influence of alcohol and cocaine. Just as in Kirkland, there was no evidence that Perry had an intent to kill prior to the homicide. Like Kirkland, the evidence in this case fails to prove premeditation, and the court should have granted a judgment of acquittal on the premeditation theory.

In Coolen, this Court also found the evidence of premeditation lacking, even though the defendant inflicted multiple knife wounds in what appeared to be an unprovoked attack. The defendant suddenly attacked the victim with a knife without warning or provocation; stabbing him multiple times -- inflicting deep stab wounds to the chest and back as well as defensive wounds on the forearm and hand. Coolen had threatened the victim with the knife earlier in the evening; Coolen and the victim fought over a beer; and the victim tried to fend off the attack. This Court rejected premeditation as a

matter of law because evidence also showed Coolen "came of nowhere" to make a sudden and unprovoked attack, and the multiple stab wounds were consistent with an unpremeditated murder resulting from an escalating fight over a beer or a preemptive attack due to Coolen's paranoid belief the victim would attack him first. Coolen, 696 So.2d at 740-742. Like Coolen, the evidence of a quick attack causing multiple stab wounds in this case fails to prove premeditation, and the court should have granted a judgment of acquittal on the premeditation theory.

The evidence failed to prove a premeditated murder in this case. Perry's motion for judgment of acquittal on this theory of prosecution should have been granted, and the charge should not have been submitted to the jury on this theory. Perry's right to due process has been violated. Art. I, secs. 9, 16, Fla. Const.; Amend. V, VI, XIV, U.S. Const. He asks this Court to reverse his conviction based on a premeditation theory.

Felon Murder Theory Insufficient:

Leo Perry had no intent to commit a robbery or theft at the time of the homicide. In both his confession and his trial testimony, Perry said he took the truck and wallet as a means to flee the scene of the homicide. (T3:461, 481; T5:870-876) The taking of the truck and wallet was an afterthought, and the

evidence did not support the conclusion that homicide was committed during and for the purpose of a robbery. The State presented no evidence to refute Perry's statement on this point.

Additionally, the fact that none of Johnston's other belongings were disturbed, including \$1150 in the pocket of a shirt beside the bed, support's Perry's statement that robbery was not his intention. (T2:338-339, 383-386) A first degree felony murder theory was not supported by the evidence. See, Mahn v. State, 714 So.2d 391 (Fla. 1998); Knowles v. State, 632 So.2d 62, 66 (Fla. 1993); Clark v. State, 609 So.2d 513, 515 (Fla. 1992). The trial court should have granted the motion for judgement of acquittal on the felony murder theory. (T5:777-780; T6:1046-1047) Perry now asks this Court to reverse his conviction for first degree murder.

In Jones v. State, 652 So.2d 346 (Fla. 1995), this Court explained the need for the threat or force element of robbery to be part of a continuous series of events with the taking of the property. This Court wrote,

Robbery is the taking of money or other property which may be the subject of larceny from the person or custody of another when in the course of the taking there is the use of force, violence, assault, or putting in fear. §812.13(1), Fla.Stat. (1989)(emphasis added). An act is considered in the course of the taking if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events. §812.13(3)(b), Fla.Stat. (1989). Thus, a taking of property that otherwise would be considered a theft constitutes robbery when in the course of the taking either force, violence, assault, or putting in fear is used. We have long recognized that it is the element of threat or force that distinguishes the offense of robbery from the offense of theft. Royal v. State, 490 So.2d 44, 46 (Fla. 1986), receded from on other grounds, Taylor v. State, 608 So.2d 804 (Fla. 1992); Montsdoca v. State, 84 Fla. 82, 93 So. 157 (1922). Under section 812.13, the violence or intimidation may occur prior to, contemporaneous with, or subsequent to the taking of the property so long as both the act of violence or intimidation and the taking constitute a continuous series of acts or events.

652 So.2d at 349.

While the taking of property after the use of force can establish a robbery, ibid., taking property after a homicide, where the motive for the homicide was not the taking of property, is not robbery. Mahn, 714 So.2d at 396-397; Knowles, 632 So.2d at 66; Clark, 609 So.2d at 515; Parker v. State, 458

So.2d 750, 754 (Fla. 1984). The homicide in this case did not occur because Leo Perry wanted to take a wallet and a truck. He wanted the truck to flee the scene after the killing. (T3:461, 480-481; T5:870-876) Although the State asserts a conflict in his statements about whether the wallet was in the room or the truck, this conflict does not alter Perry's motive or timing of the taking. (T3:461, 480-481; T5:870-876; T6:1040-1042) He took the money and the truck after the violence to effect his flight from the scene. A robbery was not proven beyond a reasonable doubt.

Perry's first degree murder conviction is not supported by sufficient evidence of a felony murder with robbery as the underlying felony. His conviction based on the evidence presented violates his right to due process. Amends. V,VI, XIV, U.S. Const.; Art. I, Secs. 9, 16, Fla. Const. He asks this Court to reverse his conviction for first degree murder based on a felony murder theory.

ISSUE II

THE TRIAL COURT ERRED IN NOT ALLOWING DEFENSE COUNSEL TO QUESTION PROSPECTIVE JURORS REGARDING WHETHER THEY UNDERSTOOD THAT A LIFE SENTENCE OPTION FOR FIRST DEGREE MURDER ACTUALLY MEANS LIFE WITHOUT PAROLE.

Defense counsel, during the jury selection questioning, attempted to inquire of prospective jurors whether they understood that the life sentence option for a first degree murder was without parole eligibility. (T1:170) The prosecutor objected on the grounds of relevancy and the trial court sustained the objection. (T1:170-171) Counsel's question and the court's ruling proceeded as follows:

[DEFENSE COUNSEL]:... Now, with respect to a penalty phase, I have to ask a few questions. In a penalty phase in a murder trial, should they go that far -- there are only two options in this case -- death by electrocution or -- you don't have to specify that, but it will be a vote -- majority for death or for life imprisonment. That will be the only other result. It will be by simple majority. That's the only result that could happen if a first-degree verdict goes to the jury and there's a finding of guilt. Is there anyone laboring under the misperception that life imprisonment in Florida means life imprisonment and not a term of shorter years due to parole?

[PROSECUTOR]: Your Honor, I object as to relevancy.

[THE COURT]: I agree. I'm going to sustain the objection.

(T1:170-171) Counsel's question was indeed relevant and appropriate. The trial court's ruling unconstitutionally

restricted Perry's right to examine prospective jurors and impaired his ability to select a fair and impartial jury to hear his case. Perry's rights to a due process and a fair trial and sentencing proceeding have been violated. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.; Fla. R. Crim. P. 3.300(b); Sanders v. State, 707 So.2d 664, 667-668 (Fla. 1998); Lavado v. State, 492 So.2d 1322, 1323 (Fla. 1986); Pope v. State, 84 Fla. 428, 94 So. 865 (1922). Perry asks this Court to reverse his case for a new trial.

This Court, through its decisions and rules, has sought to insure the right of the defense to orally examine prospective jurors on voir dire. Ibid. As this Court stated in Pope v. State, 84 Fla. 428, 438, 94 So. 865:

The examination of jurors on the voir dire in criminal trials is not to be confined strictly to the questions formulated in the statute, but should be so varied and elaborated as the circumstances surrounding the jurors under examination in relation to the case on trial would seem to require in order to obtain a fair and impartial jury, whose minds are free of all interest, bias, or prejudice. Pinder v. State, 27 Fla. 370, 8 South. Rep. 837.

Questions designed to determine if the prospective jurors had scruples against following the law applicable to the case are well within proper scope of counsel's examination. See, e.g., Sanders, 707 So.2d 664; Willacy v. State, 640 So.2d 1079,

1081-1082 (Fla. 1994)(rehabilitation of death scrupled juror); Hernandez v. State, 621 So.2d 1353, 1356 (Fla. 1993)(rehabilitation of death scrupled juror); Lavado, 492 So.2d 1322 (ability to apply intoxication defense). In quashing a lower court decision which affirmed a trial court's refusal to allow questions to the jurors concerning the intoxication defense, this Court, quoting the dissent in the lower court in Lavado, emphasized the importance to the defense of determining if a juror will understand and follow the law:

As Judge Pearson pointed out in his dissent, "[i]f he knew nothing else about the prospective jurors, the single thing that defense counsel needed to know was whether the prospective jurors could fairly and impartially consider the defense of voluntary intoxication."

Lavado, 492 So.2d at 1324.

Perry's trial counsel needed to know the prospective jurors' understanding of life imprisonment as a sentencing option in order to effectively make challenges and select a fair and impartial jury. His questioning, which the trial judge prevented, was aimed in that critical direction. A juror's understanding of a life without parole sentencing option can make a crucial difference in whether the juror votes for life or death. See, Simmons v. South Carolina, 512 U.S. 154 (1994)(capital defendant has right to have jury

informed that life sentence option is without parole eligibility). Even though Perry's trial counsel was later permitted to argue life without parole eligibility and the court instructed on this law (T8:1287, 1352, 1492-1493), counsel was still denied the opportunity to explore this issue with prospective jurors and make juror challenge decisions with the information this questioning could have revealed. This Court has recognized the importance of allowing full examination of prospective jurors on their ability to apply impartially the law governing the death penalty decision. See, e.g., Willacy, Hernandez. Perry was denied that right.

The trial court erred in restricting defense counsel's questioning of prospective jurors. Leo Perry asks this Court to reverse his case for a new penalty phase trial.

ISSUE III

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO CALL THE DEFENDANT'S EX-WIFE AS A STATE WITNESS AND TO ELICIT ON DIRECT EXAMINATION TESTIMONY OF IRRELEVANT, SPECIFIC, UNCHARGED ACTS OF VIOLENCE WHICH CONSTITUTED EVIDENCE OF NONSTATUTORY AGGRAVATION.

The State's first witness during penalty phase was Perry's ex-wife, Melissa Perry. (T7:1288) At the very beginning of direct examination, the prosecutor asked Melissa, if during her marriage to Leo Perry, he would be violent or was involved in violent activity. (T7:1288-1289) This same line of inquiry continued into the prosecutor's redirect examination as well. (T7:1308) Defense counsel objected on the ground that this subject was not relevant. (T7:1289, 1308) The court overruled the objections. (T7:1289) Melissa testified to some specific instances of violent behavior. (T7:1289, 1308) Melissa recounted an instance where Leo severely beat a friend during a fight, instances when Leo has pushed and slapped her, and an instance where Leo explained to her that a small knife could kill someone as easily as a large one. (T7: 1289-1296, 1308) The evidence was not relevant to any of the enumerated aggravating circumstances, Sec. 921.141 (5) Fla. Stat., and it was highly inflammatory and intended to prejudice the jury. This Court has held admission of such evidence in penalty phase to be reversible error. See, e.g., Hitchcock v. State,

673 So.2d 859, 861-862 (Fla. 1996); Geralds v. State, 601 So.2d 1157, 1161-1163 (Fla. 1992); Robinson v. State, 487 So.2d 1040 (Fla. 1986); Garron v. State, 528 So.2d 353, 358 (Fla. 1988) Keen v. State, 504 So.2d 396 (Fla. 1987). Based on the impact of this inadmissible evidence, Perry's death sentence has been unconstitutionally imposed. Art. I, sec. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.

Melissa Perry related an incident where Leo beat up a friend requiring him to go the hospital for treatment. (T7: 1289-1292) The friend, Steve, was staying with Melissa and Leo in a house Leo rented. (T7:1289-1290) Leo and Steve had been drinking. (T7:1290) Melissa said the Leo tended to become violent when drinking. (T7:1290) Steve and Leo began arguing and yelling at each other. (T:1290) Leo started hitting and kicking Steve. (T7:1290) Steve was too drunk to stand up. (T7:1290) Leo dragged Steve into the house and beat him until he was unconscious. (T7:1292) Leo pushed Melissa against the fireplace. (T7:1292) The police arrived and called an ambulance for Steve. (T7:1292

The State also asked Melissa Perry if Leo owned and carried knives. (T7:1293) She said that Leo used to keep and trade knives. (T7:1293) He used a boot knife and, for a time, carried a machete in the car. (T:1293) The prosecutor asked

if Leo ever talked about how a knife could be used to kill someone. (T7: 1294) After the court overruled the defense relevancy objection, Melissa said that she was scared of some of the knives because they were big. (T7:1294) Leo told her that a large knife was not needed to kill someone because a small knife could cut the jugular vein causing death quickly. (T7:1294) Melissa stated that this conversation occurred no later than 1991, since she and Leo separated in February of 1991. (T7:1296)

On redirect examination, the prosecutor asked Melissa about violence Leo exhibited toward her. (T7:1308) She recounted times when Leo allegedly hit her with objects, slammed her against walls and tried to choke her. (T7:1308)

In Hitchcock v. State, 673 So.2d 859, this Court addressed a similar problem where the State elicited evidence during direct examination of the victim's sister that the defendant had sexually abused her. Reversing for a new penalty phase trial, this Court explained that the State's direct evidence must be limited to matters relevant to aggravating circumstances. Acknowledging that the State offered the evidence, not to prove aggravating circumstances but to explain why the witness did not come forward for several years, this Court disagreed with that position. This Court

concluded that the prosecution used this theory as "a guise for the introduction of testimony about unverified collateral crimes." 673 So.2d at 861. In part, the opinion states:

We have held that, to be admissible in penalty phase, the State's direct evidence must relate to any of the aggravating circumstances. Floyd v. State, 569 So.2d 1225 (Fla. 1990), cert. denied, 501 U.S. 1259, 111 S.Ct. 2912, 115 L.Ed.2d 1075 (1991). Evidence necessary to familiarize the jury with the underlying facts of the case may also be introduced during penalty phase. Teffeteller v. State, 495 So.2d 744 (Fla. 1986). Additionally, the State may introduce victim-impact evidence pursuant to section 921.142(8), Florida Statutes (1993). See, Windom v. State, 656 So.2d 432 (Fla. 1995), cert. denied, 516 U.S. 1012, 116 S.Ct. 571, 133 L.Ed.2d 495 (1995)....

* * *

Instead, the State argues the testimony of the victim's sister during direct examination was admissible because defense counsel opened the door to it during cross-examination....

* * *

We do not agree that the testimony of the victim's sister about Hitchcock's alleged attacks upon her was responsive to the testimony elicited from her during cross-examination.....

* * *

The redirect examination, in reality, became a guise for the introduction of testimony about unverified collateral crimes. In an analogous context, we have held that the State is not permitted to present evidence of a defendant's criminal history, which constitutes inadmissible nonstatutory aggravation, under the pretense that it is being admitted for some other purpose. See, Geralds v. State, 601 So.2d 1157 (Fla. 1992).

~~Hitchcock~~ in ~~671 So.2d~~ at ~~861~~ prosecutor's direct and redirect examination of Melissa Perry case became a vehicle to introduce nonstatutory aggravation.

In Robinson v. State, 487 So.2d 1040, the prosecutor, on cross-examination of penalty phase defense witnesses, asked if the witnesses had knowledge of two crimes the defendant allegedly committed after the murder and for which he had not been charged. The State's theory was to impeach the witnesses' testimony that the defendant was a good-hearted person. Holding that the State "went too far" and that the evidence prejudiced the jury, this Court wrote:

In cross-examining several defense witnesses during the sentencing portion of this trial the state brought up two crimes that occurred after this murder and that Robinson had not even been charged with, let alone convicted of. [footnote omitted] The state argued that these questions would undermine the credibility of these witnesses who testified that Robinson was a good-hearted person and a good worker. Defense counsel objected because Robinson had not been convicted of these purported crimes, but the court allowed the state questions. In arguing to the court and then in closing argument the state gave lip service to its inability to rely on these other crimes to prove the aggravating factor of previous conviction of violent felony. [citations omitted] Arguing that giving such information to the jury by attacking a witness' credibility is permissible is a very fine distinction. A distinction we find to be meaningless because it improperly lets the state do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too

far in this instance.

Robinson, 487 So.2d at 1042.

In Geralds v. State, 601 So.2d 1157, the prosecutor attempted to impeach Geralds' good character witnesses by asking them if they were aware of Geralds' criminal history. This Court reversed, holding that the impeachment technique improperly allowed the introduction of evidence of nonstatutory aggravation:

This Court has long held that aggravating circumstances must be limited to those provided for by statute. E.g. Wike v. State, 596 So.2d 1020 (Fla. 1992); McC Campbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Miller v. State, 373 So.2d 882 (Fla. 1979). In particular, a defendant's convictions for nonviolent felonies are inadmissible evidence of nonstatutory aggravating circumstances. See, Maggard v. State, 399 So.2d 973, 977-78 (Fla.) cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598 (1981).

Geralds, 601 So.2d 1157, 1162.

Perry is aware that this Court has held that evidence of nonviolent crimes, including uncharged ones, may be admissible to rebut the assertion of the mitigating circumstance of no significant history of prior criminal activity. Sec. 921.141 (6)(a), Fla. Stat.; see, Walton v. State, 547 So.2d 622 (Fla. 1989). Additionally, Perry acknowledges that the jury instruction on this mitigating circumstance was given to the jury. (T8:1518) However, for a number of reasons, the State

cannot seek shelter under this theory to justify the evidence it introduced in this case:

First, the State presented this evidence in its case-in-chief through direct examination of its very first witness who was presented solely to introduce this testimony. (T7:1288-1294) There was no defense evidence to rebut.

Second, at the time the State introduced this evidence, the penalty phase instructions were not yet resolved, and the mitigating circumstances to be included were not finalized. This is apparent in a conference between the trial judge and counsel during a break in the defense's penalty phase case at which the prosecutor brought up instructions and asked about the mitigating circumstances to be included. (T7:1361)

Third, the defense was placed in the position of trying to ameliorate the impact of the alleged criminal behavior evidence the State introduced in its case. In addition to cross-examination of Melissa Perry, (T7:1294-1306), the defense recalled her as a defense witness to provide additional information about the context of some of the incidents she described in the State's case.(T7:1328-1332) Leo Perry had to address these incidents during his own testimony. (T7:1346-1349) Furthermore, Perry had to testify about his criminal record to place this testimony of criminal

behavior in context since he had no convictions for crimes of violence. (T8:1437-1438) Finally, defense counsel argued in closing to juxtapose Perry's nonviolent criminal record against the evidence the State presented about alleged acts of violence. (T8: 1504-1505)

The trial court erred in allowing the State to introduce the testimony concerning alleged acts of violent behavior. Admission of this evidence constituted introduction of nonstatutory aggravation which prejudiced Perry's jury. Perry now urges to reverse his death sentence and to remand his case for a new penalty phase before a new jury.

ISSUE IV

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THAT THE HOMICIDE WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

The evidence in this case was insufficient to establish the heinous, atrocious and cruel aggravating circumstance. Sec. 921.141(5)(h), Fla. Stat. According to the trial court's findings and the trial testimony, the medical examiner concluded that the wounds occurred rapidly and victim lost consciousness within one minute and could no longer feel pain. (R3:399-400; T3:515-517, 533-534)(App. A) The court erroneously instructed the jury that it could consider the HAC circumstance on such facts. (T8:1373-1374, 1516) Additionally, in the sentencing order, the trial judge improperly found HAC as an aggravating circumstance.(R3:399-400)(App. A) The jury and the trial court improperly considered the HAC circumstance rendering Leo Perry's death sentence unconstitutional. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. Perry now urges this Court to reverse his death sentence and remand for imposition of a sentence of life imprisonment.

In State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court defined the aggravating circumstance provided for in Section 921.141(5)(h), Florida Statutes and the type of crime to which it applies as follows:

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

Ibid at 9. Later, in Cheshire v. State, 568 So.2d 908 (Fla. 1990), this Court further explained the HAC circumstance:

The factor of heinous, atrocious or cruel is proper only in torturous murders--those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another.

568 So.2d at 912. To qualify for the HAC circumstance, "the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim." Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992).

The trial court made the following findings of fact in support of the HAC circumstance in this case:

2. The capital felony was especially heinous, atrocious and cruel.

The evidence established that the victim was a 75 year old man who had retired to bed for the evening and was lying tucked in bed, under a sheet, at the time that the attack on the victim commenced.

The victim was stabbed three times in the chest,

all three wounds being in close proximity to each other and one of which penetrated the heart. The Defendant also inflicted three wounds to the neck of the victim, two being on the right side of the neck and one on the left side of the neck. One of said wounds to the neck severed the jugular vein.

The medical examiner testified that the wounds which were inflicted on the victim were all pre-mortem and would be painful. In addition, he also testified that the victim had a defensive wound on his thumb and that one of the wounds to the victim's neck was irregular in shape which would be consistent with the victim struggling at the time the Defendant was slashing the victim's throat. The medical examiner also indicated that the victim would have died within about five minutes and would have been unconscious in about a minute and the wounds were probably delivered in rapid succession. These facts demonstrate that the victim was conscious at the time all of the wounds were inflicted and therefore would have experienced the pain associated with each of the wounds so inflicted.

This aggravating factor has been proven beyond a reasonable doubt and there is competent substantial evidence to prove beyond a reasonable doubt that the offense was committed in a heinous, atrocious and cruel manner and this aggravating factor will be given great weight.

(R3:399-400) Contrary to the trial court's conclusion, these facts do not establish the HAC circumstance. The wounds were administered rapidly, the victim became unconscious within one minute and lost the ability to feel pain, and death came about four minutes later. (R3:400; T3:517, 533-534) Dr. Lazarchick's opinion was that the wounds were administered within 20 seconds and not longer than 25 seconds (T3:533-534) Lazarchick also testified that the wounds produced unconsciousness within

one minute at which time the victim would no longer feel pain. (T3:517) This was not a homicide where the victim experienced long-lasting, severe pain. This was not a homicide where the manner of the killing was designed to produce suffering.

Perry's case falls within the category of cases in which this Court has disapproved the HAC circumstance where the victim suffered only a brief time before unconsciousness and death. See, Zakrewski v. State, 717 So.2d 488, 490, 492 (Fla. 1998)(victim struck unconscious before killed with blows to the head and strangulation); Brown v. State, 644 So.2d 52 (Fla. 1994)(evidence on decomposed body showed three stab wounds which would not have caused immediate death) Elam v. State, 636 So.2d 1312 (Fla. 1994)(victim beaten with a brick and suffered defensive wounds in an attack which lasted about one minute and victim lost consciousness by the end of the attack); Rhodes v. State, 547 So.2d 1201 (Fla. 1989)(victim perhaps knocked out or semi-conscious at the time of her death by strangulation); Scott v. State, 494 So.2d 1134 (Fla. 1986)(victim run over and pinned under car and died by suffocation but evidence does not reveal if victim conscious at the time of suffocation); Jackson v. State, 451 So.2d 458 (Fla. 1984)(victim conscious only moments after first shot and not conscious when other acts over a time produced death);

Herzog v. State, 439 So.2d 1372 (Fla. 1983)(victim unconscious or semi-conscious and offered no resistance throughout the attack). Although this Court has approved the HAC circumstance in cases where the victim died from multiple stab wounds, those cases were accompanied by other facts, not present in this case, showing that the victim suffered for an extended time. See, Delgado v. State, 25 Fla. L. Weekly S79 (Fla. Feb. 3, 2000)(22 wounds including 12 stab wounds; blunt force wounds including four skull fractures; and numerous defensive wounds); Guzman v. State, 721 So.2d (Fla. 1998)(19 stab wounds, several hacking wounds, blunt force wounds causing skull fractures); Mahn v. State, 714 So.2d 391 (Fla. 1998)(multiple stab wounds and several defensive wounds). The evidence in these cases contrasts with the evidence in Perry's case of a rapid attack, lasting only seconds, which caused unconsciousness within one minute. Application of the HAC circumstance to Perry's case is not supported by the evidence.

The consideration of the HAC factor in the jury's and trial court's sentencing determination incorrectly skewed the process in favor of death. Perry now urges this Court to reverse his death sentence and either remand for imposition of a life sentence or for resentencing before a newly empaneled jury.

ISSUE V

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER.

The evidence presented in this case was insufficient to establish the cold, calculated and premeditated aggravating circumstance. Sec. 921.141(5)(i), Fla. Stat. The trial court erroneously instructed the jury that it could consider this circumstance. (T8:1517-1518) Furthermore, in his findings of fact to support the death sentence, the trial judge improperly found CCP as an aggravating circumstance. (R3:397-409)(App. A) The homicide was the product of a spur-of-the-moment, impulsive act likely the result of panic or rage while Perry was under the influence of alcohol and crack cocaine. There is no evidence that Perry planned the homicide, committed it with a calculated method or acted after a time of cold reflection as the circumstance requires. See, Jackson v. State, 648 So.2d 85 (Fla. 1994). Leo Perry's death sentence has been unconstitutionally imposed due to the jury's and the trial court's erroneous consideration of the CCP aggravating circumstance. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. Perry now urges this Court to reverse his death sentence and remand for imposition of a sentence of life imprisonment.

This Court has defined this aggravating factor as requiring the prove of four elements. See, Jackson v. State, 648 So.2d 85 (Fla. 1994); Walls v. State, 641 So.2d 381 (Fla. 1994). As discussed in Walls, the four elements are defined as follows:

Under Jackson, there are four elements that must exist to establish cold calculated premeditation. The first is that "the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage." Jackson [648 So.2d at 89]
...

* * * *

Second, Jackson requires that the murder be the product of "a careful plan or prearranged design to commit murder before the fatal incident." Jackson,

* * * *

Third, Jackson, requires "heightened premeditation," which is to say, premeditation over and above what is required for unaggravated first-degree murder.

* * * *

Finally, Jackson states that the murder must have "no pretense of moral or legal justification." ... Our cases on this point generally establish that a pretense of moral or legal justification is any colorable claim based at least in part on uncontroverted and believable factual evidence or testimony that, but for its incompleteness, would constitute an excuse,

justification, or defense as to the homicide ...

Walls, at 387-388. The facts of this case fail to establish these elements. Rather than a planned killing acted upon after cool reflection, the evidence shows an impulsive, spur-of-the-moment killing likely committed while Perry was in a panic or rage compounded by the influence of alcohol and cocaine. Perry is entitled to this reasonable conclusion from the evidence which negates the CCP circumstance. Mahn v. State, 714 So.2d 398 (Fla. 1998); Geralds v. State, 601 So.2d 1157 (Fla. 1992). The trial court's conclusions to the contrary are not supported by the evidence, and the CCP circumstance should be disapproved.

The trial court's findings that the CCP circumstance was proven is fraught with unfounded factual conclusions and improper legal assumptions. In finding this aggravating circumstance, the trial court made factual and legal conclusions:

3. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner.

The evidence establishes that the Defendant waited for the victim to go to bed and fall asleep and that thereafter the Defendant obtained a knife and methodically stabbed the victim four times in the chest area and slashed his neck three times, severing the jugular vein. The evidence establishes that the knife used to kill the victim was not the boot knife which the Defendant carried on his person

and therefore it is logical to assume that the Defendant went about obtaining another knife to kill the victim rather than use the Defendant's own knife. The evidence further establishes that it was not necessary for the Defendant to kill the victim to accomplish his goal and could have taken the victim's truck keys and wallet without killing the victim.

The nature of the wounds inflicted, one of which severed the jugular vein, was a method of killing that the Defendant has discussed with Melissa Perry when he advised her that you did not need a big knife to kill a person, only a small knife provided hat[sic] you cut the jugular vein. The Defendant's conduct in this case clearly establishes beyond a reasonable doubt that the victim was executed in a cold, calculated and premeditated manner. This aggravating factor has been proven beyond a reasonable doubt and to this aggravating factor the Court will give great weight.

(R3:400-401)(App. A)

First, the court improperly found and attached significance to the conclusion that the victim was asleep at the time of the homicide. (R3:400) There is no proof that the victim was asleep. The State's circumstantial evidence did establish that the victim was in the bed at the time the wounds producing bloodshed occurred (T4:725), but nothing in the State's case indicated whether the victim was asleep or awake at the time. The fact that the victim was covered with a sheet at the time of the stabbing does not prove the victim as asleep or had been in bed immediately prior to the stabbing. (T2:320-323; T4:659) Since it was a February night, it is reasonable assumption that the victim would also have

used a blanket when going to sleep, but there were no cuts in the blanket or bedspread. (T2:306, 322) Furthermore, as the State's photographic exhibits demonstrate, the victim was not neatly tucked under a sheet as if he had been sleeping. (See, State's Photo Exhibits 1F, 1J 1K, 1L) The sheet was pulled up from the bottom of the bed, the victim's feet were exposed, and the sheet was folded or bunched up over the torso. (*Ibid.*) Perry's confession and trial testimony was that the victim was not asleep and was out of bed immediately prior to the homicide. Given the position of the body and the manner the sheet was positioned on the body, Perry's version of events was supported. The victim could have easily fallen back onto the bed from a standing position at the foot of the bed. (*Ibid.*) The State's circumstantial evidence does not refute Perry's theory, and Perry is entitled the benefit of this reasonable hypothesis from the evidence. See, Mahn v. State, 714 So.2d 398 (Fla. 1998); Geralds v. State, 601 So.2d 1157 (Fla. 1992). Furthermore, whether the victim was asleep or awake at the time is of no significance when evaluating the propriety of the CCP factor. This Court has found CCP improperly found in cases where sleeping victims were killed with multiple wounds. See, Mahn v. State, 714 So.2d 398 (Fla. 1998)(CCP disapproved where victim stabbed multiple times

while asleep in his own bed); Penn v. State, 574 So.2d 1079 (Fla. 1991)(CCP disapproved where victim beaten with a hammer while asleep in her own bed).

Second, the court improperly concluded that the stabbing was "methodical." (R3:400) Again, there is no evidence to support the stabbing was methodical. In fact, the evidence supports a contrary conclusion. The medical examiner's opinion was that all the wounds occurred very rapidly. (T3:533-534) Multiple wounds do not indicate that the killing was methodical or required planning or reflection to accomplish. See, Mahn v. State, 714 So.2d 398 (Fla. 1998)(CCP improper with multiple stab wounds); Campbell v. State, 571 So.2d 415 (Fla. 1990)(CCP improper with multiple stab wounds); Penn v. State, 574 So.2d 1079 (Fla. 1991)(CCP improper where beating victim suffered multiple wounds); Blanco v. State, 452 So.2d 520 (Fla. 1984)(CCP improper where victim shot seven times). In fact, the wounds are consistent with a frenzied attack by someone acting in a panic. This is consistent with Perry's testimony that the killing was an impulsive, spur-of-the-moment act while he was under the influence of drugs and alcohol. Dr. Fraser's opinion that Perry suffered an neuroaggressive disorder episode is likewise supported by this evidence of a quick, frenzied attack. (T8:1400-1409)

Third, the court improperly found that the knife used was not the boot knife Perry said he carried for protection. Based on that finding, the court further improperly concluded that Perry made efforts to obtain another knife to commit the homicide, thus demonstrating planning and reflection. (R3:401) This finding apparently was derived from the prosecutor's argument to the jury. (T7:1183-1184; T8:1479-1480) In that argument, the prosecutor contended that Perry did not use his boot knife because that knife was double-edged, according to Perry's own testimony, and that the wounds were made with a single edged instrument. (T7:1183-1184; T8:1479-1480) The prosecutor's argument was based on speculation. First, in Perry's confession and trial testimony, he stated that he used the double-edged knife he carried in his boot for protection.(T5:856-857, 863-869) No knife was recovered. (T5:874) Second, there was no proof that the wounds could only have been made with a single-edged blade. Although the medical examiner found some of the wounds consistent with a having been made by a single-edged knife since one side of the wound had a blunt shape (T3:501-502), he did not exclude a double-edged blade as the instrument used. (T3:501-502, 510) Explaining the wounds, Dr.Lazarchick stated that the sharp edge shape would have been from the cutting portion of the

blade and the blunt shape would have been caused by the area at the hilt of the knife where the blade joins the handle. (T3:510) The boot knife was not available as evidence and there was no testimony as to whether the sharp edges of the blade extended all the way to the hilt on both sides. A double-edged knife could very well have a sharp edge which did not extend completely to the hilt. Such a knife could produce wounds with a sharp and blunt shapes as Lazarchick described. (T3:510) Assuming for argument, Perry did acquire another knife to use, as the trial court speculated, this is legally insignificant and does not lead to the conclusion that the homicide was planned and calculated. See, Mahn v. State, 714 So.2d 398 (Fla. 1998)(CCP improper where defendant selected knife from kitchen to stab victim in bedroom); Penn v. State, 574 So.2d 1079 (Fla. 1991)(CCP improper where defendant selected hammer from laundry room before beating victim in bedroom).

Fourth, the court improperly found that the killing was not necessary to accomplish the goal of taking the truck keys and wallet. (R3:401) Initially, this finding assumes that Perry had a goal of taking the truck and wallet at the time of the homicide. The evidence does not support such an assumption. (See, Arguments presented in Issue I, *supra*. and

Issue VI, infra.) Moreover, a conclusion that the homicide was "not necessary" negates rather than supports a CCP finding. Perry's testimony was that the killing was an impulsive, spur-of-the-moment act while he was intoxicated and was not part of any goal to take property. Such a killing does not qualify for the CCP circumstance. See, Penn v. State, 574 So.2d 1079 (Fla. 1991)(CCP not proper where defendant who was using crack cocaine stole items from house but beat sleeping victim to death for no reason).

Fifth, the court found that the severing of the jugular vein was a method of killing Perry once discussed with Melissa Perry when he explained to her that a big knife was no more dangerous than a small knife. (R3:410; T7:1294, 1296) The fact that Perry may have once had such a discussion with his ex-wife, six years before the homicide, has no relevance to this homicide and is not probative of Perry's state of mind at the time of the killing. (See, Arguments presented in Issue III, supra. incorporated by reference here in support of this argument)

The cold, calculated and premeditated aggravating circumstance was not proven beyond a reasonable doubt. This circumstance should not have been considered by the jury and judge in the sentencing decision. Perry asks this Court to

reverse his death sentence.

ISSUE VI
THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THAT THE HOMICIDE OCCURRED DURING THE COMMISSION OF A ROBBERY.

The evidence presented in this case was insufficient to establish the aggravating circumstance that the homicide was committed during the course of a robbery. Sec. 921.141(5)(d), Fla. Stat. The trial court erroneously instructed the jury that it could consider this circumstance. (T8:1516) Furthermore, in his findings of fact to support the death sentence, the trial judge improperly found that the homicide was committed during a robbery as an aggravating circumstance.(R3:398-399)(App.A) The argument concerning insufficiency of the evidence to establish a robbery has been presented in Issue I, *supra.*, and Perry incorporates that argument here by reference.

Leo Perry's death sentence has been unconstitutionally imposed due to the jury's and the trial court's erroneous consideration of this aggravating circumstance in reaching a sentencing decision. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV, U.S. Const. He now urges this Court to reverse his death sentence and remand for imposition of a sentence of life imprisonment.

ISSUE VII

THE TRIAL COURT ERRED IN REFUSING TO GIVE THE REQUESTED INSTRUCTION THAT THE JUDGE MUST GIVE THE JURY'S SENTENCING RECOMMENDATION GREAT WEIGHT.

During the penalty phase charge conference, Perry submitted a special requested instruction which would have advised the jury that its sentencing recommendation was entitled to great weight. (T8: 1381-1382) He based his request on Caldwell v. Mississippi, 472 U.S. 320 (1985), where the Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments. The trial court denied the request and instructed the jury as follows:

As you have been told, the final decision as to what punishment shall be imposed is my responsibility; however, it is your duty to follow the law that will now be given to you by the court and render to the court an advisory sentence....

(T8:1515)

The instruction given in this case violates Caldwell, and the Eighth and Fourteenth Amendments to the United States Constitution. This instruction is incomplete, misleading and misstates Florida law. Contrary to the instruction, the sentence is not solely the trial judge's responsibility because the jury in Florida is a co-sentencer. Espinosa v.

Florida, 505 U.S. 1079 (1992). The instruction failed to advise the jury of the importance of its recommendation. The instruction failed to mention the requirement that the sentencing judge give the recommendation great weight. Finally, the instruction failed to mention the special significance of a life recommendation under Tedder v. State, 322 So.2d 908 (Fla. 1975).

In Caldwell, the Supreme Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

[An] uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell, 472 U.S. at 333. Although a Florida jury's role is to recommend a sentence, not impose sentence, the importance of the jury's recommendation has established the jury as co-sentencer in the Florida death penalty sentencing scheme. See, Espinosa. The reasoning of Caldwell is applicable. See, also, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted, Dugger v. Adams, 485 U.S. 933, 108 S.Ct. 1106, 99 L.Ed.2d 267, reversed, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1988). A

recommendation of life affords the capital defendant greater protections than one of death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, the jury's decision is critical, and any diminution of its importance violates Caldwell. Adams; Mann v. Dugger, 817 F.2d 1471, 1489-1490 (11th Cir.), on rehearing, 844 F.2d 1446 (11th Cir. 1988), cert. den., 489 U.S. 1071 (1989).

Perry sought to ameliorate the trial court's erroneous instruction by the request that the jury be advised that its decision must be afforded great weight in the sentencing equation.(T8:1381-1382) Perry realizes that this Court has ruled unfavorably to this position in the past. E.g., Archer v. State, 673 So.2d 17 (Fla. 1996); Combs v. State, 525 So.2d 853 (Fla. 1988); Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987). However, he asks this Court to reconsider this ruling in light of Espinosa in which the jury's role was clarified and recognized to be that of a co-sentencer. Perry urges this Court to reverse his sentence and remand his case for a new penalty phase trial before a new jury.

ISSUE VIII
THE TRIAL COURT ERRED IN SENTENCING PERRY TO DEATH
SINCE SUCH A SENTENCE IS DISPROPORTIONATE.

In performing proportionality review, this Court evaluates the totality of the circumstances and compares the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. E.g., Urbin v. State, 714 So.2d 411, 416-417 (Fla. 1998); Terry v. State, 668 So.2d 954, 965 (Fla. 1996); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). Such a review in this case demonstrates that this case does not involve one of the most aggravated and least mitigated of murders. See, Urbin, 714 So.2d at 416; State v. Dixon, 283 So.2d 1, 7 (Fla. 1973).

Initially, as presented in Issues IV, V and VI, the three aggravating circumstances the trial court relied upon were not proven beyond a reasonable doubt. Since this leaves no valid aggravating circumstances, Perry's death sentence cannot stand. E.g. Thompson v. State, 565 So.2d 1311 (Fla. 1990). However, even assuming for argument that the State's theory of prosecution was proven and that this homicide occurred during a robbery, the death sentence remains disproportionate. This Court has routinely held that a death sentence is disproportionate for murders simply occurring during a robbery

or burglary. See, e.g., Williams v. State, 707 So.2d 683 (Fla. 1998); Clark v. State, 609 So.2d 513 (Fla. 1992); Proffitt v. State, 510 So.2d 896 (Fla. 1987); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Richardson v. State, 437 So.2d 1091 (Fla. 1983). Even if the trial court finds no mitigating factors, the result does not change. See, Terry v. State, 668 So.2d 954; Rembert, 445 So.2d 337; Richardson, 437 So.2d 1091.

There is, however, significant mitigation in this case. The trial court found all of the sixteen nonstatutory mitigating circumstances the defense offered. (R3:404-409)(App. A) Although the court rejected the statutory mitigating circumstances that Perry suffered from an extreme mental or emotional disturbance, sec. 921.141(6)(b) Fla. Stat., and that Perry's capacity to appreciate the criminality of his conduct was substantially impaired, sec. 912.141(6)(f) Fla. Stat., there is record support from which these circumstances could have been found.

Comparable Cases

There are several cases in which this Court has held a death sentence disproportionate which compare favorably to Perry's case. Many of these are even more aggravated and less mitigated than his, but this Court has concluded a death

sentence unwarranted.

In Penn v. State, 574 So.2d 1079 (Fla. 1991), the defendant was convicted of beating his mother to death with a claw hammer while she slept. Penn confessed that he was stealing his mothers property from her home to exchange for crack cocaine. He claimed he was intoxicated and high on crack the night of the murder. A state witness claimed that Penn did not appear intoxicated. The trial court found HAC and CCP in aggravation. In mitigation, no significant criminal history and extreme mental disturbance was found. This Court disapproved CCP and held the sentence disproportionate.

In Proffitt v. State, 510 So.2d 896 (Fla. 1987), the defendant stabbed his victim as he awoke during the burglary of his residence. The trial court found the homicide was cold, calculated and premeditated in addition to being committed during the burglary. This Court reduced the sentence.

In Richardson v. State, 437 So.2d 1091 (Fla. 1983), the defendant beat his victim to death during a residential burglary. This Court approved four of the six aggravating circumstances the trial court found. No mitigating circumstances were found to exist. His sentence was reversed

for imposition of life imprisonment.

In Rembert v. State, 445 So.2d 337 (Fla. 1984), the defendant killed the elderly proprietor of a bait and tackle shop during a robbery. Rembert struck the victim with a club which resulted in severe brain injury and death. The trial court found four aggravating circumstances, but this Court disapprove three of them. Although the defense presented some evidence of nonstatutory mitigating circumstances, the trial court found no mitigating circumstances. Rembert's death sentence was reversed.

In Terry v. State, 668 So.2d 954 (Fla. 1996), one of two robbery victims was shot and killed. Terry's codefendant, Floyd, confessed that he and Terry were looking for a place to rob. Floyd also said that Terry was the one who robbed the deceased victim while he held the other victim. DNA tests matched stains on Terry's shoes to the victim's blood. In aggravation, the trial court found two aggravating circumstances -- prior conviction for a violent felony based on a contemporaneous aggravated assault and homicide committed during a robbery. The trial court found no statutory or nonstatutory mitigating circumstances. This Court held the death sentence disproportionate.

In, Sinclair v. State, 657 So.2d 1138 (Fla. 1995), the defendant was convicted of murdering a taxicab driver during

a robbery. The driver was shot twice in the head. The judge found three nonstatutory mitigating factors which he gave little or no weight. However, this Court found the death sentence disproportionate.

In Clark v. State, 609 So.2d 513 (Fla. 1992), the defendant went drinking with two friends and another man, Carter, who had just been hired for a job which Clark had also sought. Clark stopped the car in a remote area and shot Carter once in the chest. Clark reloaded the shotgun and shot Carter again in the mouth. After the shooting, Clark said that he guessed he had the job now. The trial court found no mitigating circumstances, however this Court concluded that evidence established nonstatutory mitigation. Clark's death sentence was reduced to life.

In McKinney v. State, 579 So.2d 80 (Fla. 1991), the robbery victim was shot seven times and suffered lacerations to the head. His body was dumped from a moving car into an alley. The victim was semiconscious when found and gave a description of his assailant before he died at the hospital. This Court disapproved two of the three aggravating circumstances the trial court found which left only the circumstance that the murder occurred during a violent felony (robbery, kidnapping and burglary). The trial court

found one statutory mitigator -- no significant criminal history. The court also found nonstatutory mitigation, but gave it little or no weight. This Court vacated the death sentence.

In DeAngelo v. State, 616 So.2d 6 (Fla. 1993) The defendant became angry at the victim who rented space in defendant's residence. The victim died as the result of manual and ligature strangulation lasting up to ten minutes. This Court approved the finding of CCP, based on evidence the defendant planned the murder a week earlier, and the trial court's rejection of HAC because there was a question of whether victim was conscious during the killing. Mitigation included previous conflict with the victim and defendant's mental condition. The death sentence was found to be disproportionate.

Just as this Court concluded in the above cases, Leo Perry's death sentence is disproportionate. Perry asks this Court to reverse his death sentence.

CONCLUSION

Upon the foregoing reasons and authorities, Leo Edward Perry, Jr., asks this Court to reverse his judgment and sentence and direct that he be discharged on the first degree murder and a judgment for second degree murder be entered. If this Court does not reverse the first degree murder conviction, Perry asks this Court to reverse his death sentence and remand for entry of a sentence of life imprisonment. Alternatively, Perry asks that his death sentence be reversed, and he be afforded a new penalty phase proceeding with a new jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Carolyn Snurkowski, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, and by U. S. Mail to appellant, on this ____ day of June, 2000.

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